Petition

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81-444

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KATHERINE E. MODIN,
Petitioner,

vs.

NEW YORK CENTRAL COMPANY and/or its successors in interest, PENN CENTRAL COMPANY and/or its successors in interest, TRUSTEES FOR PENN CENTRAL; ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. MCARTHUR, and/or their successors in interest, CONSOLIDATED RAIL CORPORATION, and MUTUAL OF NEW YORK LIFE INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

The petitioner's deceased husband, Roy Modin, was an employee in good standing with the New York Central Railroad from July 1, 1942, until his demise in November 1975. In 1962, Mr. Modin received notice that he had, as a fringe benefit, life insurance equal to twice his annual salary with the premiums to be paid by the said company. This policy of insurance applied to non-union employees of which Mr. Modin was one. Mr. Modin was further notified in 1965 of an examiners report recommending to the I.C.C. approval of a proposed merger with Pennsylvania Railroad Company. In this letter, from the president of New York Central, he was assured that he would not be excluded from fringe benefits among other such promises. This letter is exhibited at (A-24).

The Interstate Commerce Commission made its decision April 6, 1966, 327 I.C.C. 543, wherein pursuant to 49 U.S.C. 5(2)(F) it approved the arrangement for the railway workers and provided that non-union workers would be accorded the same benefits as union workers. In February of 1968 as a result of a new union contract, Mr. Modin was notified that as a condition precedent to his employment he must join the union.

Upon his demise in 1975, Mr. Modin's widow, Katherine E. Modin, was notified that Mr. Modin lost his life insurance benefits at the time he was required to join the union. At the time of his death, this would have amounted to Thirty Thousand Dollars. At no time, was Mr. Modin ever notified in any manner that he would no longer be entitled to this insurance.

The questions here relate to the protection available to Mr. Modin under 49 U.S.C. 5(2)(F) and *Norfolk and Western Railway Company* v. *Nemitz,* 404 U.S. 37 (1971).

1. Whether an employee who is required to join the union and thereby have his life insurance fringe benefits reduced from $30,000.00 as a non-union employee to $6,000.00 as a union employee, has been deprived of his rights under 49 U.S.C. 5(2)(F) of not being placed in a worse position with respect to his employment.

2. Whether the action of the Penn Central violated the I.C.C. order 327 I.C.C. 543 wherein the I.C.C. ordered that "none shall be deprived of employment or be placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment."

3. Whether 49 U.S.C. 5(2)(F) as interpreted in *Norfolk and Western Railway Company* v. *Nemitz,* 404 U.S. 37 (1971) would allow the interpretation of the District Court to the effect that as long as non-union employees were not reduced in benefits below that of union employees, then such reductions are not violative of the act.

4. Whether the interpretation by the Court of Appeals is the correct application of 5(2)(F) and *Nemitz* in holding that Mr. Modin could be deprived of fringe benefits inasmuch as he received other benefits as a union employee.

5. Whether a contract between the union and the railroad which causes the employee to lose substantial fringe benefits violates 49 U.S.C. 5(2)(F).

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Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals Sixth Circuit

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TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Katherine E. Modin, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on June 2, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported and is set forth in the appendix hereto (A-1).

The opinion of the United States District Court for the Western District of Tennessee, Western Division appears in the appendix hereto (A-20).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered June 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

49 U.S.C. 5 (2)(F) provides, in pertinent part:

> "(f) As a condition of its approval, under paragraph of any transaction involving a carrier of carriers by railroad subject to the provisions of this chapter, the commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval, the commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agree-

ment pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representatives of its or their employees."

I.C.C. decision 327 I.C.C. 543, in pertinent part: (A-29).

STATEMENT OF THE CASE

This case originated upon a Complaint alleging that the widow of Roy Modin was entitled to insurance in an amount double his annual salary because of a vesting of rights therein pursuant to promises made by the company and rights granted by 49 U.S.C. 5 (2)(F) and especially as interpreted by *Norfolk and Western Railway Company* v. *Nemitz*, 404 U.S. 37 (1971). The District Court ruled in its first order the statute was not violated for reason that the I.C.C. order 377 I.C.C. 543 granted only benefits equal to that of the union employees. The second order further held that no tort claim was available by virtue of the company ever having sent any notice to Mr. Modin. The Sixth Circuit affirmed for different reasons holding that Mr. Modin had otherwise been benefited by the union and that as a result of his being switched from union to non-union to union employment in 1970 to 1972, his right to recover was barred by the statute of limitations.

This case was tried upon Motions for Summary Judgment by all parties and there are no disputed facts.

It would appear that many collateral issues have been discussed and decided. The petitioner seeks certiorari upon the basis that these decisions deviated from *Norfolk and Western Railway Company* v. *Nemitz*, 404 U.S. 37 (1971) and greatly reduced the protection contemplated in 49 U.S.C. 5 (2)(F).

The jurisdiction in the trial court was predicated upon the diversity of citizenship of all parties and the cause of action arising out of Federal law and the I.C.C. order.

REASONS FOR GRANTING THE WRIT

The petitioner feels that both the District Court and the United States Court of Appeals for the Sixth Circuit have decided this case in a manner squarely in conflict with *Norfolk and Western Railway* v. *Nemitz,* 404 U.S. 37 (1971).

1. The railroad wrote Mr. Modin on February 2, 1968 announcing that in consumation of the merger, it had entered into a new contract with the union which required as a condition to his continued employment, he must join the union. The railroad could not deprive Mr. Modin of his fringe benefits without violating 49 U.S.C. 5 (2)(F) as applied in *Norfolk and Western Railway Company* v. *Nemitz,* 404 U.S. 37. The letter is appended hereto (A-34) and also (R-13).

In the *Nemitz* case this Honorable Court ruled that agreements made pursuant to the last sentence of 5 (2)(F) may vary the protections afforded by the I.C.C. order, but it could not substantially abrogate employees rights. Clearly, neither the act nor *Nemitz* limits the monetary considerations of the employees to those granted to the union employees.

In *Nemitz* the railroad and union entered into a new contract just subsequent to a merger. As a result, some of the junior employees were caused to suffer substantial loses in wages. In holding that the agreement between the railroad and the union was unenforceable, this Honorable Court held that one of the principal purposes of 5 (2)(F) was to provide mandatory protection for the interests of employees affected by railroad condolidations.

In the case of *Railway Executives Association* v. *United States,* 339 U.S. 142, the above principal was set forth, but more importantly *Railway* amplifies the purpose and spirit behind 5 (2)(F) which is the cornerstone for the holding in *Nemitz.* Your petitioner believes that one need only substitute fringe benefits for wages to bring her case four square with *Nemitz* and urges

that her case as decided by the Court of Appeals violates both the purpose and spirit established in the above cases. The I.C.C. report 327 I.C.C. at 543, 544 requires that all of the benefits accorded to union employees shall also be extended to non-union employees in that none shall be deprived of employment or be placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment. The petitioner urges that this reduces her case to a simple arithmetical proposition whereby her husband having lost 80% of his fringe benefit life insurance, is entitled to and has been denied the benefits of 5 (2)(F).

2. The heart of this case is in the petitioner's theory that the action of the railroad in cancelling her husband's fringe benefit life insurance, violates 5 (2)(F) and that issue alone determines the case.

If the Court of Appeals is correct in its decision, then non-union employees effected by railroad consolidation may be reduced to the monetary amounts available to union employees, or put another way, non-union employees may lawfully be placed in a worse position with respect to their fringe benefits provided they receive wage increases and job security.

The importance of this case is to be found in the fact that if allowed to stand in its present posture, this case will greatly erode the rights intended under 5 (2)(F) and virtually negate the meaning of *Nemitz* and *Railway*. It means perhaps many widows will be confronted with the prospect of the insurance which both they and their husbands had relied upon having been removed without notice or recourse.

CONCLUSION

The petitioner has taken the posture that all of the other discussions made in both courts are rendered moot, if petitioner's husband was entitled to fringe benefit, to-wit life insurance in effect at the time of the merger. If we are correct, Mr. Modin became vested in his rights to the insurance at that time.

It is for this reason we seek the attention of the Supreme Court of the United States and pray that the Writ of Certiorari issue.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A

No. 78-1594

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KATHERINE E. MODIN,
Plaintiff-Appellant,

v.

NEW YORK CENTRAL COMPANY and/or its successors in interest; PENN CENTRAL and/or its successors in interest; TRUSTEES OF PENN CENTRAL — Robert W. Blanchette, Richard C. Bond, John H. McArthur — and/or its successors in interest; CONSOLIDATED RAIL CORPORATION; MUTUAL OF NEW YORK LIFE INSURANCE COMPANY,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed June 2, 1981.

Before: MERRITT, KENNEDY and MARTIN, Circuit Judges.

MERRITT, Circuit Judge, delivered the opinion of the Court, in which MARTIN, Circuit Judge, joined. KENNEDY, Circuit Judge, (pp. 12-14) filed a separate concurring opinion.

MERRITT, Circuit Judge. This case arises from the cancellation of an insurance policy on the life of an employee of the New York Central Railroad. Defendant Penn Central Rail-

road cancelled the policy without notice after the 1966 merger of the Pennsylvania and New York Central Railroads. Plaintiff's decedent, Roy A. Modin, was a long-time non-union clerk for the New York Central in its Memphis office prior to the merger. Four years before the merger, New York Central obtained and began paying the premium on a group life insurance policy with defendant Mutual of New York Life Insurance Company for a class of non-union employees, including Modin. Modin's policy was cancelled after the merger when he became a union member subject to the pay and fringe benefits of the collective bargaining agreement. The policy contained a conversion clause allowing Modin to continue the policy himself if cancelled by the railroad, a privilege Modin did not exercise because the railroad did not give him notice of the cancellation. Had the policy remained in effect at the time of Modin's death in 1975, it would have paid plaintiff, Modin's widow, approximately $30,000.

After the merger, Penn Central cancelled the policy on Modin's life because under the merger agreement, as modified and approved by the Interstate Commerce Commission, Modin was required to join the Brotherhood of Railway Clerks as a condition of employment. As a union member, he was no longer a member of the class of employees covered by the group life policy. He received added benefits and job security under the collective bargaining agreement, but his life insurance benefits as a union member were reduced to $6,000.

Neither the policy itself nor any contractual arrangement between Modin and New York Central required the railroad to give the employee notice of cancellation. No such notice was ever given. Modin apparently did not know that his transfer to union status forfeited the policy. At no time was he ever advised that transfer to union status would effect a cancellation of the policy. On July 23, 1974, six years after the cancellation, he wrote a letter to the Brotherhood of Railway Clerks advising the union that he had relied on continued

insurance coverage and asking the union for confirmation that the life insurance policy was still in effect.[1] He apparently did not receive a reply.

In this action Modin's widow makes two federal claims and a state claim. (1) The cancellation of the old policy by Penn Central violated both 49 U.S.C. § 5(2)(f) (a provision of the Interstate Commerce Act governing treatment of employees

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[1] The letter in its entirety reads as follows:

1812 Whitman
Memphis, Tennessee 38116
July 23, 1974

Mr. C. L. Dennis,
International President,
Brotherhood of Ry, Airline & Steamship Clerks,
6300 River Road
Rosemont, Ill. 60018

Dear Mr. Dennis:

I have received the attached letter from Mr. C. L. Stainbrook, SWSM, Penn Central Transportation Co., Houston, Texas.

What I cannot understand is why the Off-Line people have not been informed by the Brotherhood. Representation for the Off-Line offices is nil, as we never hear anything from our Brotherhood except for the paper and magazine. We do not even know who to contact, addresses, telephone numbers, etc, in case we should have any problems and need to act quick.

Would like to bring to your attention the fact that for around 25 years I held Life Insurance with the NYC and PC under "excepted" position (non union) and this life insurance increased in 1966 to double my annual salary. I have the policies and letters to substantiate this.

My understanding is that when the Merger took place that we should not lose any of our fringe benefits, which actually amounts to a cut in salary.

As you know, the BRAC Life Insurance is only $8,000, whereas the non-agreement employees have life insurance in the amount of twice their annual salary, and with salaries increasing in 1975 their life insurance policies will be considerable more. I had banked on this insurance, or would have taken out more life insurance years ago.

Will you please set me straight on this matter, as I plan to go after this life insurance if I am entitled to it.

Thanks much.

Sincerely and Fraternally,

Roy A. Modin

during railroad consolidations)[2] and the employee protection provisions of the I.C.C. order approving the merger under § 5 (2)(f).[3] (2) The cancellation without notice prevented the exercise of the conversion privilege contained in the policy and the failure to give notice violated the terms of the I.C.C. order approving the merger, even if the cancellation was proper.[4] (3) In any event, the cancellation by his employer and the insurance company without specific notice to the employee prevented exercise of the conversion privilege provided in the policy and violated applicable principles of state insurance law requiring notice. We will address these issues in the order listed.

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[2] At 49 U.S.C. § 5(2)(f), the Act provides in pertinent part: "As a condition of its approval [of a railroad merger], the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing . . . such transaction will not result in employees of the carrier . . . being in a worse position with respect to their employment . . . ."

[3] The I.C.C. order in question contains two paragraphs relevant to the issue. The first paragraph says that no employee "shall be deprived of employment or be placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment."

The second relevant paragraph of the I.C.C. order provides:

> As to the affected employees not represented by the signatory unions, § 5(2)(f) requires that a fair and equitable arrangement be provided to protect their interest . . . . The agreement [with the union], if made applicable to these employees as well as the 75% of the work force represented by the 23 unions, would provide the required guarantees . . . . [I]t would appear, that as the product of the negotiation efforts of the leaders of the signatory unions, the agreement . . . embodies the kind of benefits which rail labor in general seeks . . . . We find it fair and equitable, and as a condition to our approval of the merger, require that [the agreement] be applied to the affected employees not represented by the signatory unions.

Pennsylvania R.R. Co. — Merger — New York Central R.R. Co., 327 I.C.C. 475, 543-45 (1966).

[4] The I.C.C. order approving the merger provides that a non-union employee in Modin's position will be "notified by the Company that he will be affected in his employment as a result of the merger [concerning] . . . protective benefits" so that he "will have adequate information upon which to act with regard to the employee protections afforded herein . . . ." 327 I.C.C. at 545.

On motion for summary judgment, the District Court ruled in favor of the defendants. It ruled that the cancellation and failure to notify did not violate federal law. It further held that under applicable choice of law principles Tennessee law applies and that under Tennessee law neither the employer nor the insurance company incurred liability by failing to notify Modin of the cancellation of the policy. We affirm, but for reasons different from those asserted by the District Court.

I.

Section 5(2)(f) of the Interstate Commerce Act requires the I.C.C. in connection with railroad mergers to "require a fair and equitable arrangement to protect . . . railroad employees." Employees have a private right of action for damages against a railroad for violations of the employee arrangements imposed by the I.C.C. in connection with the approval of railroad mergers. *Norfolk & Western Railway Co.* v. *Nemitz*, 404 U.S. 37 (1971).

The first question in the instant case is whether the railroad's cancellation of the group life policy on Modin's life violated the conditions imposed by the I.C.C. in its order approving the merger. All parties agree that one of the conditions imposed by the I.C.C. with the consent of the railroads for the protection of employees was the requirement that nonunion clerks in Modin's position join the Brotherhood of Railway Clerks as a condition of employment. Plaintiff does not contend that this condition was invalid. Plaintiff recognizes that the I.C.C. order and the merger agreement do not mention cancellation of the insurance policy in question or cover this subject specifically. Rather she argues that the I.C.C. order and the merger agreement should be construed to prohibit cancellation because the cancellation of the policy violates the spirit of the I.C.C. order and the merger agreement, one of the purposes of which was to see that employees are

not "placed in a worse position" as a result of the merger "with respect to working conditions, fringe benefits or rights and privileges pertaining thereto . . . ."

Plaintiff's argument on this federal claim is unpersuasive. The cancellation of the policy was not unfair. Although Modin lost his $30,000 life insurance policy and received instead a $6,000 policy when he joined the union, he received in addition significant benefits as a union member from 1968 to 1975 that he would not have otherwise received. His rate of pay increased dramatically, and he received job security. As a result he was not laid off after the merger or when Penn Central became insolvent and filed proceedings in bankruptcy. Modin was not entitled under § 5(2)(f) of the Act or the I.C.C. order approving the merger or any contractual arrangement to receive all of the benefits of his old status as a non-union member as well as the added benefits of his new status as a union member. No principle of federal law, nor any contract made pursuant to a federal statute or regulation governing the merger, required the railroad to continue Modin's non-union group life insurance policy.

II.

Plaintiff's second claim is that defendants' failure to provide notice of cancellation violated the terms of the I.C.C. order approving the merger. Although the notification provision of the order may be subject to varying interpretations, we believe that Modin should have received notice from his employer that his transfer to union status would effect a forfeiture of his life insurance policy, so that he could take advantage of the policy's conversion privilege.[3] The I.C.C. order

[3] Judge Kennedy takes the position in her concurring opinion that the employer's failure to provide notice in 1968 was not the proximate cause of plaintiff's injury because the employee's failure to continue his insurance individually came only after a second transfer in 1972. In so concluding, she points to Modin's transfer to a non-union position in 1970, his voluntary return to a union job in 1972,

approving the merger contemplates that non-union employees will have some decisions to make "as to protective benefits" and may choose "recourse to benefits in some way not a part of the [mandatory] conditions" imposed by the I.C.C. To this end the I.C.C. order contemplates that the non-union employee be "notified by the Company that he will be affected" and be given "adequate information upon which to act." 327 I.C.C. at 545.

Any claim based on the I.C.C. order, however, is time-barred. Plaintiff's suit, filed in September 1976, is too late. The statute of limitations applicable to this action is provided by the Interstate Commerce Act, at 49 U.S.C. § 16, par. (3)(b):

> All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after . . . .

It is well settled that the limitation applies to complaints filed in the courts as well as those filed with the I.C.C. *A. J. Phillips Co.* v. *Grand Trunk Western Railway*, 236 U.S. 662 (1915). It is also clear that the complaint need not be based directly

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and the employer's failure to notify him at that later date. She argues that the employer had no federal duty to notify Modin in 1972 under the Interstate Commerce Act because the railroad reorganization was complete and that the railroad's 1972 omission constitutes a superseding, intervening cause. The employer's failure to notify in 1968, however, seems clearly to be a cause in fact of the injury. But for that original failure to notify, Modin could not have remained unaware of the insurance consequences of a change to union status in 1968 or 1972. Had the employer notified Modin in 1972, it could have eliminated any chance that its earlier failure to notify would cause subsequent harm. But whether, as Judge Kennedy concludes, the 1972 failure to notify constitutes an independent intervening cause of harm is a factual issue that should not be resolved against plaintiff in reviewing defendants' motion for summary judgment. *See Michael* v. *United States*, 338 F.2d 219, 221 (6th Cir. 1964). It seems strange, indeed, to say that the employer's 1972 omission can cure its 1968 omission. It should have foreseen in 1968 that the employee might remain unaware of his rights at a later date.

We do agree with Judge Kennedy and the District Court that federal law imposes no liability on defendant insurance company for failure to notify Modin of the cancellation by his employer.

upon the statute for the limitation to apply. In *Louisville & Nashville Railroad* v. *Cory*, 54 F.2d 8 (6th Cir. 1931), the plaintiff relied on federal common law rather than the Interstate Commerce Act in making a claim against a carrier subject to the Act. He argued that for that reason the Act's statute of limitations did not apply. The court rejected the argument. It noted that an action based directly on the Act would, of course, be governed by its limitation period and concluded that the same period must "apply to all actions involving subject-matter directly covered by the act." *Id.* at 11. The time at which the two-year limitation begins to run, however, is less certain. It is not appropriate for the period to begin when the wrong complained of – the failure to provide notice – occurred, because plaintiff might remain unaware of the wrong until long after the limitation period had ended. This Court has recognized that problem but has employed more than one test to determine the point at which the period begins to run. In *Union Carbide & Carbon Corp.* v. *Stapleton*, 237 F.2d 229 (6th Cir. 1956), the plaintiff sued his employer for failing to notify him of disease identified by the employer's physical examination of him. Then-Judge Potter Stewart, finding that the Tennessee law on which the substantive claim was based provided no answer to the limitations problem, held that the defendant's continuing duty to notify ended only when the plaintiff left its employ. Later Sixth Circuit decisions have set up a rule that in some cases points to a different result. In cases involving Federal Tort Claims Act malpractice claims, which raise similar problems of the wrong not coming to the plaintiff's attention until after the limitations period has run, this Court has held that the limitations period begins to run "when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [wrong]." *Jordan* v. *United States*, 503 F.2d 620, 622 (6th Cir. 1974). This rule, described by then-Judge Wade McCree as "the general rule," has also been applied to an unfair labor practice claim.

N.L.R.B. v. *Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977). The application of the rule seems appropriate in this case as well.

But either rule applied here brings the same result. Under Justice Stewart's rule, the limitations period would have begun in May 1970, when Modin returned to a non-union position and thereby regained insurance coverage. As of that date, defendants' duty to warn ended; they no longer had anything of which to warn. The two-year period would have ended in May 1972, before Modin returned to a union position. Under the more flexible rule employed by this Court in more recent cases, plaintiff's cause of action could have accrued no later than July 1974. In that month Modin wrote the letter requesting confirmation of his status but received no answer. By that time, if not earlier, Modin must have "discovered, or in the exercise of reasonable diligence should have discovered" his employer's wrong. *Jordan* v. *United States*, 503 F.2d at 622.

III.

Plaintiff's third claim rests on duties imposed by state law. She argues that defendant railroad companies failed to provide the notice of cancellation of the insurance policy that state laws mandate.[6] We conclude that because state laws are preempted by federal regulation, her claim fails.

The Interstate Commerce Act provides a comprehensive scheme of federal regulation of railroads, including detailed provisions regulating mergers and the protection of employees. It is clear that Congress has the power to preempt state law

[6] We also agree with the District Court in its finding that state law imposes no liability on defendant insurance company for failure to notify Modin of the cancellation by his employer. *See Reger* v. *National Ass'n of Bedding Mfrs.*, 372 N.Y.S. 2d 97, 122, 83 Misc.2d 527 (1975); Tenn. Code Ann. § 56-7-601(c); *Metropolitan Life Ins. Co.* v. *Owens*, 193 Tenn. 545, 246 S.W.2d 971 (1952); *American Nat'l Ins. Co.* v. *Jackson*, 12 Tenn. App. 305 (1930).

in the field of railroad mergers, and it has expressed its concern that state law not interfere with such transactions at 49 U.S.C. § 5, par. (11):

> The authority conferred [on the I.C.C.] by this section shall be conclusive and plenary, . . . and any carriers . . . participating in a transaction approved or authorized under the provisions of this section shall be . . . relieved from the operation . . . of all . . . restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect . . . the terms and conditions, if any, imposed by the Commission. . . .

In this area "the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). "[S]tate regulation must give way" because it cannot "be enforced without impairing the federal superintendence of the field . . . ." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963).

The merger of multi-state railroad systems implicates important national interests that should not be thwarted by state rules imposing possibly conflicting duties. In this case, no state has expressed an intent that its notice requirements be applied in the context of interstate railroad mergers; rather plaintiff seeks to import duties validly imposed by states in other contexts into this. Here, federal law has itself provided protection for the interests state law might recognize. The effect of a federal statute of limitations imposed on a federal right would be diminished if state limitations periods could extend the periods for identical rights granted by the state. The operation of an interstate railroad system would be needlessly complicated if varying rights of notification prevailed in the different states it touches. Federal interests would be

equally infringed if the state in which an interstate railroad is incorporated could impose conditions of notification applicable to employees located in other states.

Because we conclude that state law is preempted, we need not reach the questions of choice of law raised and briefed by the parties. Accordingly, the judgment of the District Court is affirmed.

KENNEDY, Circuit Judge, concurring. I agree with the panel that plaintiff-appellant does not have a claim under the I.C.C. order for the cancellation of the insurance. I also agree that her tort claim that the railroad failed to notify her deceased husband of his change in insurance coverage is barred by the statute of limitations. However, I differ as to the rationale for the denial of the tort claim and would prefer to rest upon the reasons stated by the District Court.

The District Court ruled for the defendants-appellees on their motions for summary judgment. It found that the facts were not in dispute that the decedent had been covered by the $30,000 non-union life insurance policy until the merger in 1968, when, pursuant to labor agreements, the decedent became a union member covered only by the $6,000 union group-life insurance policy. However, subsequent to that, during 1970-72, decedent was again placed on an exempt or non-union status and was again covered by the $30,000 policy. At his request, in 1972, he was transferred back to a union position and once again was covered by the $6,000 policy. The District Court only considered the tort claim of whether decedent should have been warned when he was last transferred from non-union to union status. It held that that state claim was not recognizable by Tennessee law and was barred by New York's statute of limitations.

The panel holds that there is a federal right to be notified when the decedent was first transferred from non-union to union status based on the I.C.C.'s order in this case. It goes on to hold that this federal right is barred by the statute of limitations. Further, it holds that national concerns with railroads and their mergers preempted any state tort claim for failure to warn when the decedent was first transferred.

I do not think the Court need reach these questions as it is clear that the first failure to warn was not the proximate cause of the injury in the present case. To be actionable, an act of negligence must have been a proximate cause of the

claimed tortious event. An intervening cause which is independent of the negligence absolves the first negligent actor of his liability. *See Hicks* v. *United States*, 511 F.2d 407, 421, 167 U.S. App. D.C. 169 (D.C. Cir. 1975) (finding no intervening cause); *Michael* v. *United States*, 338 F.2d 219, 221 (6th Cir. 1964) (finding an intervening cause). Had the decedent died before being placed again on non-union status, then the injury would have been caused by the first failure to warn. However, when he was transferred to non-union status after the merger, he was again covered. Had he died during this period of coverage, his widow would have recovered the full $30,000 despite any failure to warn at the time of the merger. Her failure to recover $30,000 was caused by a failure to warn of the change in coverage when he was transferred to union status a second time. This second failure to warn is thus an independent and intervening cause of the injury. The record does not indicate that this second failure to warn was in any way related to the merger. Therefore, the proximate cause of the injury — the alleged second failure to warn — cannot give rise to a federal cause of action.

There remain to be considered the decedent's widow's claims under state theories. The District Court found that at the time of the second transfer the contract was with a New York insurance company and a Pennsylvania railroad company. The policies were issued in New York. The decedent's duty station was Memphis, Tennessee. The court found that it was in Tennessee where allegedly the decedent should have been warned of the change in insurance coverage so he could extend the coverage himself and where the benefits were to be paid.

A federal court when considering the state claims in a diversity case must apply the conflict of laws rules prevailing in the forum state. In Tennessee, the law of the place of wrong, or lex loci delicti, controls an action sounding in tort. *See Telecommunications, Engineering Sales & Services Corp.* v. *Southern Telephone Supply Co.*, 518 F.2d 392, 394 (6th Cir.

1975) (Georgia law applied as that is place of alleged failure to discharge employee who had signed a contract in Tennessee not to work for competitor); *Winters* v. *Maxby*, 481 S.W.2d 755, 756 (Tenn. 1972).

Tennessee does not recognize a claim against the employer for failure to warn the beneficiaries of a group insurance contract that the contract was being cancelled. The parties to the contract are the employer and the insurer, not the employees who are the beneficiaries. *See Davis* v. *Metropolitan Insurance Co.*, 161 Tenn. 655, 660-61, 32 S.W.2d 1034 (1930). Thus, the decedent's widow in the present case is without a remedy under federal or state law for her claim and the judgment of the District Court should be affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-76-459

Katherine E. Modin,
Plaintiff,

v.

New York Central Company, *et al.*,
Defendants.

ORDER

This is a suit brought by the widow of a deceased employee of the New York Central Railroad Company, which was effected in 1962 by a merger with the Pennsylvania Railroad. The employee continued with the Railroad until his death and this suit is for benefits of life insurance which had been in effect prior to the merger of the New York Central and the Pennsylvania Railroads.

In 1962, Modin's employer offered group life insurance coverage, at company cost, to all workers not covered by a Collective Bargaining Agreement. At the time Modin was not covered by a Collective Bargaining Agreement in respect to his employment in the Memphis office. The death benefits under the arrangement amounted to twice the amount of the worker's annual salary. Mr. Modin was then a fully excepted employee and received a certificate of coverage under the group policy. By its terms, the policy's benefits were to end upon "termination of (the insured's) continuous service in an eligible class of employees for any reason whatsoever."

49 USC § 5(2)(F) provides that as a condition to approving a railroad merger, the ICC must require fair and equitable arrangement to protect those employees who may be affected by the merger. Notwithstanding these conditions, however, agreements for protection of the employees may be entered into by a union and an employer-railroad thereafter.

In 1964, in preparation for the proposed 1968 merger of the New York Central Railroad Company with the Pennsylvania Railroad Company, the unions and railroads involved agreed that no worker subject to Collective Bargaining Agreements would be "placed in a worse position with respect . . . fringe benefits or rights and privileges pertaining thereto at any time during employment."

As a condition to approving the merger, the ICC required that this same agreement be applied to all employees, including non-union or excepted employees, as well as those covered in bargaining units.

On April 5, 1965, the railroad informed Mr. Modin of this arrangement that:

> "OTHER EMPLOYES NOT SUBJECT TO AGREEMENTS WITH UNIONS.
>
> No such employee will be deprived of employment, or have his compensation reduced or be excluded from fringe benefits as a result of the merger or in anticipation of the merger until he retires, resigns, dies, or is removed for cause. The objective of the company is to provide the same basic protection as has been afforded employes represented by labor unions as recommended in the Interstate Commerce Commission Examiners' Report of March 29, 1965."

In 1968, soon after the merger, Mr. Modin was notified that, due to a recently negotiated working agreement with the

Brotherhood of Railway, Airline and Steamship Clerks, his position was no longer fully excepted and that he would have to join the union as a condition to his continued employment. (A requirement different from that imposed as a matter of State Law of Tennessee, the place of his employment.)

Apparently at some time during the years 1970-1972, Modin was again placed in an excepted or exempt status, being in some type of managerial position with the railroad. Again, however, in 1974, he was advised that he was fully covered and would again have to join the union under the prior arrangements.

On November 6, 1975, Mr. Modin died an employee in good standing in a bargaining unit. His widow has been paid union group life insurance benefits of $6,000 and now claims $30,000, being the amount which would have been due had his original certificate of insurance been applicable, as the plaintiff now claims that it is.

Plaintiff's contention is that benefits of the prior policy were vested absolutely in the decdent regardless of his change of status from an exempted employee to that of a union employee. A later collective bargaining agreement following a merger may "vary or supplement" an ICC order approving a railroad merger but it may not substantially abrogate workers' rights thereunder." *Nemitz* v. *Norfolk & Western Railroad,* 436 F.2d 841, 848 (6th Cir. 1970), *affirmed in a four to three decision,* 404 U.S. 37, 44 (1971. *Nemitz, supra,* held that "employees shall not be placed in a worse position with respect to compensation and that no 'job freeze' is required." 436 F.2d 847, 848, citing *Brotherhood* v. *United States,* 366 U.S. 169, 176-177 (1961).

In this situation, as distinguished from *Nemitz,* the ICC order merely insured that non-union (non-unit) employees such as Modin at that time would receive the same minimum standard of protection as afforded union or unit employees. Jobs or

classification of jobs were not frozen. Compare *Batts* v. *L & N Railroad*, 316 F.2d 22 (6th Cir. 1963). Did the defendant railroad's letter in 1965, however, form the basis of an estoppel so that defendant cannot now deny protection which the deceased may have expected at that time? Like union employees, Modin was entitled to be in no worse position insofar as compensation was concerned as a result of the merger. Modin, of course, has been treated in the same fashion as any unit or union employee, and this situation or condition with respect to expected life insurance benefits was not changed due to the merger either by reason of a union agreement or the ICC order approving the merger. Modin himself expressed doubts about the group insurance benefit to which he would have been entitled had he not been re-classified to a union status in a letter to a union official.

Modin himself paid no part of a life insurance premium for the benefit paid to his widow nor for the additional benefit here demanded. Nothing in the record reflects any want of good faith or subterfuge in respect to the transfer or re-classification of Modin during his lifetime.

I conclude that Modin was not vested indefeasibly of rights to the group life insurance policy in question either before or after the merger. No union agreement or ICC order operated to change his position in this respect since his job and classification was not frozen and this is not a claim with respect to reduced compensation as in *Nemitz, supra*. There is no showing of any attempt by the defendant to avoid the obligations imposed upon it by collective bargaining arrangements or ICC requirements. Modin's vested rights were not abrogated under these circumstances.

There remains, however, another issue: can plaintiff recover on a tort rather than a contract theory from the Railroad by reason of a failure of notice with regard to discontinuance of benefits? The master group policy was a New York contract

between the railroad employer and M.O.N.Y., the insurer. New York law would impose a ninety day extension period to what would otherwise be the termination date of group life coverage. McKinney's *Consolidated Laws of New York*, Ch. 27, § 204, sub. 3 (1966). See *Miller* v. *Metropolitan Life Insurance Co.*, 64 Misc. 2d 658, 315 N.Y.S.2d 353 (1970); *Payne* v. *Equitable Life Assurance Society*, 14 A.D.2d 266, 220 N.Y.S. 2d 493, *aff'd.* 11 N.Y.S. 2d 1006, 183 N.E.2d 763 (1961). Under New York law, then, even in absence of notice, defendant insurer would not be liable to plaintiff. The employer may or could, however, by liable for a negligent or deliberate failure to notify a beneficiary of a potential loss of group life benefits. *McGinnis* v. *Bankers Life Co.*, 39 A.D. 2d 393, 334 N.Y.S. 2d 270 (1972). See 44 Am.Jur.2d *Insurance*, § 1878; *Antinona* v. *Nationwide Life Insurance Co.*, 76 Misc.2d 599, 350 N.Y.S.2d 863 (1973). Compare *Massachusetts Mutual Life Insurance Co.* v. *DeSalvo*, 482 P.2d 380 (Colo., 1971).

The parties should address themselves to the specific issue as to defendant railroad's possible liability for failure to notify plaintiff of loss of benefits if convertible privileges existed at the time. The memoranda should address the question as to when such a potential cause of action arose and which law of limitations applies. Motions to amend are granted. The parties should file any further matters within thirty (30) days. The motion for summary judgment is granted, but only to the extent indicated.

This 18 day of May, 1978.

Harry W. Wellford, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-76-459

Katherine E. Modin,
Plaintiff,

v.

New York Central Company, *et al.*,
Defendants.

MEMORANDUM OPINION

Roy A. Modin was along time employee of the New York Central Railroad Company prior to its merger with Pennsylvania Railroad Company. The Penn Central Company is a resulting reorganization of the railroads until its reorganization as a part of the Consolidated Rail Corporation. Mr. Modin died in November of 1975 and this suit involves the claim of his surviving widow for insurance benefits as a result of his death, which insurance benefits allegedly arise out of the employment relationship.

As a non-union employee of the Railroad, Mr. Modin was first informed that he was entitled to certain group life insurance benefits in July of 1962. In February of 1968, however, Mr. Modin was required, pursuant to Railroad labor agreements to join a union as a result of the merger between the New York Central and the Pennsylvania Railroads. Under the terms of the group life insurance policy then in effect, Modin's non-union group life insurance benefits terminated when he ceased to become a member of the eligible class of that in-

surance, that is as a non-union employee, and he became substituted to other rights as a union class of employee under collective bargaining agreements.

In May of 1970, Modin was transferred from a union position to a non-union position and once more became eligible for the non-union group life insurance benefits. At his request in September of 1972, however, he was transferred back to a union position, and it is the defendants' posture that Modin's benefits under the non-union group life insurance policy terminated at this time. Mutual Life Insurance Company wrote the policy which covered former NYC non-union employees until May 31, 1968, at which time the New York Life Insurance Company assumed group life coverage of such employees. The policies in each instance were non-contributory and did not require the employee to pay any premiums, nor did the policies require the employer or the insurer to notify an employee of the termination of non-union group life benefits. These policies were issued in the State of New York.

When Modin was last transferred from a non-union to a union position, the railroad company with which he was affiliated was a Pennsylvania corporation, maintaining its principal business and headquarters in that State, although Mr. Modin's duty station remained throughout in Memphis. For further reference to facts in this case, see the Court's Order of May 18, 1978, wherein the Court concluded that Modin was not vested indefeasibly with rights to the group life insurance policy either before or after the merger.

Since the Court has determined that there is no contractual right of action against the defendants under the circumstances, the question remains as to whether there is a tort liability by reason of any representations or duties owed by the defendants to the plaintiff as the widow and/or beneficiary of the deceased.

Since any claim of the plaintiff is not based upon contractual rights, it would appear that the Court should apply the law of

Tennessee or the law of Pennsylvania to the issues to determine whether a cause of action exists under the factual circumstances. It would appear that Tennessee law should control under conflict principles. See *Babcock* v. *Maple Leaf, Inc.*, 424 F.Supp. 428 (E.D. Tenn. 1976); *Koehler* v. *Cummings*, 380 F.Supp. 1294 (M.D. Tenn. 1974). It was in this State that the non-payment of benefits allegedly due occurred, and where notice failed to be given.

In viewing the law of Tennessee, the Court does not believe that a cause of action exists where the employer, making all the contributions for an insurance contract fails to notify or cause to be notified an insured with regard to a change or cessation of insurance rights. *See Davis* v. *Metropolitan Life Insurance Co.*, 161 Tenn. 655, 32 S.W.2d 1034 (1930); *Missouri State Life Insurance Company* v. *Hinkle*, 18 Tenn. App. 228, 74 S.W.2d 1082 (1934); *American National Insurance Co.* v. *Jackson*, 12 Tenn. App. 305 (1930), *cert. den.* (Tenn. Sup. Ct., 2/7/31). The Court does not believe that there is a duty imposed upon the employer under these circumstances to notify the employee, even though there existed peculiar circumstances relative to the change in status of the Railroads in reorganization and with respect to the classification of Mr. Modin as an employee.

This is a difficult and interesting case which has been well presented by the lawyers on either side. The Court has taken some time in arriving at its conclusion in view of the complexity of the issues presented. The Court concludes, after thorough consideration of the factors well presented to the Court, that there is no contractual or statutory remedy afforded the plaintiff in this case. Neither New York nor the Tennessee law affords a basis for recovery to the plaintiff. *See McGinnis* v. *Bankers Life Co.*, 39 App.Div.2d 393, 334 N.Y.S.2d 270 (1972). Furthermore, for the reasons stated the Court has found that the defendants did not violate any tort responsibility or duty to the plaintiff under all the circumstances.

Judgment will be entered for the defendants accordingly.

This 3rd day of October, 1978.

Harry W. Wellford, Judge
United States District Court

APPENDIX D

NEW YORK CENTRAL SYSTEM

New York, April 5, 1965

TO NEW YORK CENTRAL NON—AGREEMENT EMPLOYES, OTHER THAN SUPERVISORS, MANAGERS, AND OFFICERS:

The recent Examiners' report recommended that the Interstate Commerce Commission approve our proposed merger with the Pennsylvania Railroad. This brings us closer to a merger that will be a big step forward for our railroad and a step beneficial to its employes. It is, therefore, important for you to understand what the merger holds for you.

The personnel policies which apply to you and other employes not subject to agreements with unions are outlined in Section II of the attachment to this letter. Simply stated, they guarantee that you will not be deprived of employment or have your compensation reduced as a result of the merger. Recognizing that it will be necessary to relocate some employes, it is provided that their expenses will be paid if they are transferred. Finally, if they are unwilling to relocate, they will receive lump sum severance payments.

Understanding of these policies should reassure you for the challenging period that lies ahead. Once the merger takes effect, we shall begin to make the improvements and changes necessary to obtain the benefits of the merger. Many will occur gradually over a period of five years or more, and in the meantime, we must maintain continuous, efficient transportation service. This obviously is going to require the best efforts of all New York Central people.

I hope that you are looking forward to our merger as confidently as I am. Merger will greatly strengthen our company by

helping it become more efficient and more competitive than ever before. Thus, it will benefit every one of us by affording better opportunities than we have ever had before for advancement and achievement.

Sincerely,

/s/ August E. Perlman

Personnel Policy for Merger of the Pennsylvania and New York Central Railroads

Applying to Supervisors, Managers, Officers, and other Employes Not Subject to Agreements with Unions

The success of the merged company will depend greatly on the skills, knowledge, and experience of its supervisors, managers, officers, and other employes not subject to agreements with unions. In keeping with the treatment accorded employes subject to agreements with unions, it will be the policy to avoid adverse effect on all non-agreement personnel. In addition, it will be a primary objective to assign them so that their capabilities and experience can be most effectively used and, at the same time, to hold dislocation of these people and their families to a minimum. This will be done in keeping with the requirements of efficiency and the merged company's needs.

Accordingly, these policies will apply to supervisors, managers, other officers, and other employes (except temporary personnel) not subject to agreements with unions. They will apply to all changes affecting these persons that occur as the result of the merger or in anticipation of the merger. Special provision will be made for handling those exceptional situations where inequity or undue personal or family hardship would otherwise result.

I. *Supervisors, Managers, and Officers.*

A. No supervisor, manager, or officer who is presently employed by one of the individual companies will be deprived of employment, or have his compensation reduced, or be excluded from fringe benefits as a result of the merger or in anticipation of the merger until he retires, resigns, dies, or is removed for cause. However, the company may offer any such person a position in either a different geographical location, a new field of endeavor, or both.

B. Ability and qualifications, including experience and familiarity with duties, will be the primary considerations in making assignments to positions.

C. Any such supervisor, manager, or officer required to relocate will be entitled to (1) living expenses for himself and family while traveling and securing a new home, (2) moving expenses for household goods, (3) reimbursement for costs and losses in the sale of a home or in cancellation of a lease and (4) a $500 allowance to cover other transfer expense.

D. Any such person under 60 years of age who is unwilling to relocate or take a position in a new field of endeavor will be granted a lump sum severance payment at the rate of position last held and based upon length of service as follows:

Length of Service	*Separation Payment*
Less than one year	5 days' pay for each month of service
One year and less than 2 years	3 months' pay
Two years and less than 3 years	6 months' pay
Three years and less than 5 years	9 months' pay
Five years or more	12 months' pay

E. The company may elect to retire any such person between ages 60 and 65 and he, as well as any such person over 60 years of age who is unwilling to relocate or accept a position in a new field of endeavor, will be provided interim pension allowances that will enable him to be retired with pension equal to that he would receive at 65 with the same amount of service.

II. *Other Employes Not Subject to Agreements with Unions.*

A. No such employe will be deprived of employment, or have his compensation reduced, or be excluded from fringe benefits as a result of the merger or in anticipation of the merger until he retires, resigns, dies, or is removed for cause. The objective of the company is to provide the same basic protection as has been afforded employes represented by labor unions as recommended in the Interstate Commerce Commission Examiners' Report of March 29, 1965.

B. Any such employe who is required to relocate will be entitled to (1) living expenses for himself and family while traveling and securing a new home, (2) compensation for any wage loss during a reasonable transfer time, (3) moving expenses for household goods, (4) reimbursement for losses in the sale of a home or cancellation of a lease, and (5) a $500 allowance to cover other transfer expenses.

C. Any such employe who is unwilling to relocate will be granted a lump sum severance payment at the rate of position last held and based on length of service as follows:

Length of Service	*Separation Payment*
Less than one year	5 days' pay for each month of service
One year and less than 2 years	3 months' pay
Two years and less than 3 years	6 months' pay
Three years and less than 5 years	9 months' pay
Five years or more	12 months' pay

April 5, 1965

APPENDIX E

327 I.C.C. 543-46

PENNSYLVANIA R. CO.—MERGER—NEW YORK CENTRAL R. CO. 543

Having considered the representations made on behalf of the minority stockholders, we find nothing in the record to support the conditions they request.

Employee Conditions

The applicants and 23 unions representing about 75 percent of the applicants' employees, on May 20, 1964, entered into an agreement for the protection of those employees represented by the signatory unions who might be adversely affected by the merger. The agreement provides that the transportation Company will accord its employees most of the benefits of the Washington Job Protection Agreement of 1936, and, in addition will retain all employees of PRR and NYC who are willing to accept employment, and that none shall be deprived of employment or be placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment. The Company is free to transfer work throughout its system and employees will have the opportunity to move to places where new jobs are created; but transfer of employees across seniority lines will be within their craft on the basis of implementing agreements to be negotiated from time to time as provided for in the basic agreement. Disputes are to be arbitrated—under a plan which we consider superior to that contained in the Washington Agreement. Applicants are willing to make the terms of the agreement available to all the employees whom we are required by law to consider in evaluating the proposed merger, including those not represented by the signatory unions.

Though they have in the past reduced the number of their employees by more than 50 percent over a ten-year period, the applicants, under this agreement will not be free to reduce their work force unless business contracts by more than 5 percent in any 30-day period, in which event the work force may be reduced one percent for each one percent business decline in excess of the said 5 percent. If the plan of the merger successfully materializes, however, and company growth results, new and additional jobs will be created. This, along with normal attrition and the voluntary separation from employment of those who would rather not move to a new location, should enable the Transportation Company to maximize the proficient utilization of the retained work force.

327 I.C.C.

The cost of protection provided by the agreement is estimated as $78 ¼ million, of which practically all would be payable over the first 8 years. That is almost $5 million less than the estimated cost of providing benefits under the *New Orleans* conditions. While these estimates are necessarily imprecise, and perhaps could be improved by more exacting studies over longer periods of time, we find them to be reasonably adequate. Since technological advances and other variable factors affecting employment make their influences felt to a large extent in unpredictable ways, the data presented by the applicants may well be as reliable as could be expected. On this record, therefore, we find nothing of substance to support the contentions that the cost of the employee benefits under the agreement is understated and that the conditions will impose a burden on other railroads.

The last sentence of section 5(2(f) of the act provides that, notwithstanding any other provisions of the act, employee protection may be established by agreement between a railroad and the unions representing its employees. Consequently, except to find, as we do, that the agreement of May 20, 1964 does not

render the proposed transaction inconsistent with the public interest, we can make no requirement as to the protection of employees covered by the agreement.

As to the affected employees not represented by the signatory unions, section 5(2)(f) requires that a fair and equitable arrangement be provided to protect their interests so that the transaction will not result in their being in a worse position with respect to their employment. The agreement discussed above, if made applicable to these employees as well as the 75 percent of the work force represented by the 23 unions, would provide the required guarantees. Under it, employees would be retained in their present or comparable employment, with no worsening of position. If the employment makes a change of location necessary, the move would be at the carrier's expense, and, in this respect, the provisions of the agreement are not unlike those prescribed by the Commission in other consolidation cases. Should an employee choose not to move, he would be entitled to a severance allowance like that of the Washington Agreement, a contract executed by practically all of the Nation's railroads and rail employee unions, and one which has been retained by them down through the years. Moreover, it would appear that, as the product of the negotiation efforts of the leaders of the signatory unions, the agreement of May 20, 1964, embodies the kind of benefits which rail labor in general seeks; and as to its attrition provisions, is probably more beneficial to employees than are collective bargaining agreements in most, if not all, other industries. We find it fair and equitable, and as a condition to our approval of the merger, require that it be applied to the affected employees not represented by the signatory unions.

It must be recognized that applicants have agreed to certain benefits greater than we have heretofore required of any section 5 applicant, e.g., the job-retention (attrition) and the limitations against reduction in force, which embrace protection from adverse effects not causally connected with the merger. At the present stage in the evolution of employee-management rela-

tions, there may be some question as to our power to impose conditions dealing with matters having no causal relation to the section 5(2) transaction before us. By the same token, the signatory unions have conceded certain rights gained through previous collective bargaining. The exchange of *quid pro quo* appears entirely reasonable. The agreement constitutes a package plan giving employees more than they have previously been able to attain, and which is not severable as to its parts. Accordingly, and in view of the applicants' willingness to extend the benefits to all employees, we have adopted the plan as a package in the unique circumstances of this case. To give symmetry to systemwide employee relations and make the employee benefit plan practical for application throughout the system, and to place the nonsignatory employees in a position equivalent to those represented by the signatory unions, i.e., no better or worse; it will be necessary for the nonsignatory employees to make a commitment to the Transportation Company, in writing, indicating their agreement to the conditions and obligations here prescribed for their protection. If, within 30 days after the time he is first notified by the Company that he will be affected in his employment as a result of the merger, the nonsignatory employee fails to so indicate his intention as to protective benefits, he will be presumed to have chosen recourse to benefits in some way not a part of these conditions.

So that all nonsignatory employees will have adequate information upon which to act with regard to the employee protections afforded herein, the Transportation Company shall disseminate to them the terms stated herein and in the agreement of May 20, 1964. The dissemination shall be accomplished prior to or at the same time notice is given as required in the preceding paragraph. The company shall, within 60 days after the effective date of our order herein, apprise this Commission of the steps being taken and material published to satisfy this requirement.

Employees of included carriers.—BLE contends that the employees of carriers included in this transaction under section 5(2)(d) should receive the benefits set out in the agreement of May 20, 1964. It cites section 2 of that agreement which provides that:

> In the event merger or control of other carriers not now involved in the aforesaid merger proceedings should be ordered by the Commission as a condition of its approval of the pending transaction, this agreement shall be subject to amendment by the parties so as to provide the employee benefits set forth in section 1 hereof to the employees of any such carrier controlled by or merged into the merged company.

Each of the inclusions for which we have made provision herein will be brought before the Commission in appropriate inclusion proceedings. In connection with those proceedings, it is presumed that the same amendments will be made as contemplated by the above quoted section 2. In any event, whether or not such amendments are made and voluntary agreement for employee protection reached in those proceedings, we shall make appropriate provision therein so that the employees affected by such inclusions as are accomplished, will have the protection due them under the law.

APPENDIX F

PENNSYLVANIA NEW YORK CENTRAL
TRANSPORTATION COMPANY

Saint Louis, Missouri
February 2, 1968

Mr. R.A. Modin
Chief Clerk-Freight Sales Department
Memphis, Tennessee

Dear Mr. Modin:

The managements of the New York Central and Pennsylvania Railroads have negotiated a new working agreement with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes for The Pennsylvania New York Central Transportation Company, effective with consummation of the merger, February 1, 1968.

The scope rule of the new working agreement provides that certain positions on the New York Central Railroad will be affected as follows:

(1) All present positions designated as "PAD" or "PADO" will be subject to the union shop agreement.

(2) Specific present positions designated as "excepted" will be subject to most rules of the new working agreement, including the union shop but will continue to be appointive positions not subject to the bidding and displacement rules.

(3) Specific present positions designated as "excepted" will be subject to all rules of the new working agreement including the union shop.

The position you occupy is one described in Item (2) above. This means that you must as a condition of continued employment with the Pennsylvania New York Central Transportation Company join the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station employees by March 31, 1968. You will be advised later as to where you must file your application for membership. If you have any questions, you should confer with your immediate supervisor.

Very truly yours,

R. G. Meldahl

Opposition

1

Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L. STEVAS

No. 81-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KATHERINE E. MODIN,
Petitioner,

vs.

NEW YORK CENTRAL COMPANY and/or its successors in interest; PENN CENTRAL COMPANY and/or its successors in interest; TRUSTEES FOR PENN CENTRAL, ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. MCARTHUR, and/or their successors in interest; CONSOLIDATED RAIL CORPORATION; and MUTUAL OF NEW YORK LIFE INSURANCE COMPANY,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

COUNTERSTATEMENT OF QUESTION PRESENTED

WHETHER THE DISTRICT COURT CORRECTLY HELD THAT RESPONDENTS DID NOT VIOLATE 49 U.S.C. § 5(2)(f) BY RECLASSIFYING CERTAIN NON-UNION EMPLOYEES AS UNION EMPLOYEES AND BY PROVIDING THEM THE SAME POST-MERGER FRINGE BENEFITS AS WERE GUARANTEED TO ALL UNION EMPLOYEES?

PARTIES

The Petitioner, Katherine E. Modin, is the widow of a deceased railroad employee, Roy A. Modin. Respondents are: the New York Central Railroad Company (New York Central); the successor in interest to the New York Central, the Pennsylvania-New York Central Transportation Company (Penn Central); the persons who administered Penn-Central during its reorganization, the named Trustees of the Penn Central (Trustees); Penn Central Corporation, which administered Penn Central following the discharge of the Trustees; Consolidated Rail Corporation (Conrail), which acquired the rail assets of Penn Central; and the Mutual of New York Life Insurance Company (MONY). This brief is filed on behalf of all Respondents except MONY, which will file a separate brief in this matter.

Pursuant to Rule 28.1 of the Rules of this Court, a list of the parent, subsidiary and affiliated companies of each Respondent, except MONY, is set forth in Appendix A to this Brief.

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STATUTES:

49 U.S.C. § 5(2)(f) (1970) [recodified as 49 U.S.C. § 11347 (1978)] ..... *passim*

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MISCELLANEOUS:

Pennsylvania R. R. Co. — Merger — New York Central R. R. Co., 327 I.C.C. 475 (1966) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-444

KATHERINE E. MODIN, *Petitioner,*

v.

NEW YORK CENTRAL COMPANY, *et al., Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed June 2, 1981, is reported at 650 F.2d 836. The unreported opinions of the United States District Court for the Western District of Tennessee, Western Division, filed May 18, 1978, and October 3, 1978, are reproduced in Appendices B and C to the Petition.

JURISDICTION

The jurisdictional statement contained in the Petition is adequate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of Constitutional and Statutory Provisions Involved contained in the Petition is adequate. However, as a result of the revision and recodification of

statutes related to transportation, 49 U.S.C. § 5(2)(f) is now 49 U.S.C. §11347. [Although the language of 49 U.S.C. §11347 differs from the language of 49 U.S.C. § 5(2)(f), the difference cannot be construed as making any substantive change to the meaning of 49 U.S.C. § 5(2)(f). *See* Pub. L. No. 95-473, § 3, 92 Stat. 1466 (October 17, 1978). The language of 49 U.S.C. §11347 is reproduced in Appendix B to this Brief.]

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Petitioner's statement of the case, Respondents offer the following counterstatement:

Petitioner is the widow of a railroad employee who, during the course of his employment with the New York Central and Penn Central, served in both non-union and union positions. At the time of his death, Petitioner's decedent was a union employee insured under a union group life insurance policy. Petitioner seeks in this case to recover death benefits which were payable under a non-union group life insurance policy that covered her husband's life during the periods in which he served as a non-union employee. Petitioner bases her claim upon 49 U.S.C. § 5(2)(f) and a 1966 order of the Interstate Commerce Commission (ICC) which approved the merger of the New York Central Railroad Company and Pennsylvania Railroad Company.

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), requires the ICC to make a fair and equitable arrangement for the protection of the interests of railroad employees affected by a merger. On April 6, 1966, the ICC approved the merger of the New York Central Railroad Company with the Pennsylvania Railroad Company and, as a condition of its approval, required the New York Central and the Pennsylvania Railroad Company to extend the protections of a 1964 union

agreement to all non-union employees. The 1964 union agreement required the railroads to retain all employees of both railroads who were willing to accept employment and to place none "in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment." *Pennsylvania R. R. Co. - Merger - New York Central R. R. Co.*, 327 I.C.C. 475, 543 (1966). The purpose of extending the protections of the union agreement to non-union employees was "to place the nonsignatory employees in a position equivalent to those represented by the signatory unions, i.e., no better or worse." 327 I.C.C. 545; Appendix E to the Petition, p. A-32.

In 1962, Petitioner's husband, Roy A. Modin, was a non-union employee of the New York Central. As such, he was insured under a non-contributory group life insurance policy that provided death benefits equal to twice his annual salary. In April 1965, New York Central's management notified Mr. Modin by letter of the pending merger with the Pennsylvania Railroad Company and informed him that, as a non-union employee, he would not be deprived of employment, have his compensation reduced, or be excluded from fringe benefits as a result of the merger until he retired, resigned, died or was removed for cause. New York Central's management stated: "The objective of the company is to provide the same basic protection as has been afforded employees represented by labor unions as recommended in the Interstate Commerce Commission Examiners' Report of March 29, 1965." Appendix D to the Petition, p. A-27.

In February, 1968, New York Central's management advised Mr. Modin by letter that his non-union position would be reclassified as a union position subject to the rules of a collective bargaining agreement that would be-

agreement to all non-union employees. The 1964 union agreement required the railroads to retain all employees of both railroads who were willing to accept employment and to place none "in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment." *Pennsylvania R. R. Co. - Merger - New York Central R. R. Co.*, 327 I.C.C. 475, 543 (1966). The purpose of extending the protections of the union agreement to non-union employees was "to place the nonsignatory employees in a position equivalent to those represented by the signatory unions, i.e., no better or worse." 327 I.C.C. 545; Appendix E to the Petition, p. A-32.

In 1962, Petitioner's husband, Roy A. Modin, was a non-union employee of the New York Central. As such, he was insured under a non-contributory group life insurance policy that provided death benefits equal to twice his annual salary. In April 1965, New York Central's management notified Mr. Modin by letter of the pending merger with the Pennsylvania Railroad Company and informed him that, as a non-union employee, he would not be deprived of employment, have his compensation reduced, or be excluded from fringe benefits as a result of the merger until he retired, resigned, died or was removed for cause. New York Central's management stated: "The objective of the company is to provide the same basic protection as has been afforded employees represented by labor unions as recommended in the Interstate Commerce Commission Examiners' Report of March 29, 1965." Appendix D to the Petition, p. A-27.

In February, 1968, New York Central's management advised Mr. Modin by letter that his non-union position would be reclassified as a union position subject to the rules of a collective bargaining agreement that would be-

come effective upon consummation of the merger on February 1, 1968. Mr. Modin was further advised that, as a condition of continued employment, he was required to join the Brotherhood of Railway, Airline and Steamship Clerks. Appendix F to the Petition, p. A-34. Mr. Modin joined the union and became eligible for union group life insurance benefits; under the express terms of the non-union group policy, he became ineligible for non-union insurance benefits.

Mr. Modin worked for Penn Central as a union employee until May 1970, at which time he was temporarily transferred to a non-union position and once again became eligible for non-union insurance benefits. In September 1972, Mr. Modin was transferred at his request back to a union position; once again, he became eligible for union insurance benefits and ineligible for non-union insurance benefits. During the periods of his employment as a union employee following the merger, Mr. Modin never received pay, fringe benefits or merger protections below the level prescribed for union employees.

Although Mr. Modin was notified of his reclassification from non-union to union status as a result of the merger in February 1968, Mr. Modin was not specifically informed by New York Central or Penn Central of the concomitant termination of his non-union group life insurance benefits. (The module certificate given to Mr. Modin by MONY, the original non-union group life insuror, did state, however, that his insurance would cease upon "termination of his continuous service in an Eligible Class of Employees for any reason whatsoever." Appendix A to Brief of MONY.) Similarly, when Mr. Modin was transferred at his request from a non-union position back to a union position in September 1972, Mr. Modin was not formally notified of the termination of his non-union insurance benefits. However, in July 1974,

Mr. Modin had sufficient doubts regarding his coverage under the non-union policy to request clarification from his union. Appendix A to the Petition, p. A-3.

Mr. Modin died in November 1975, and the Petitioner, as beneficiary, was paid a life insurance benefit of approximately $6,000.00 pursuant to the terms of the union group life insurance policy. Petitioner filed this action on September 16, 1976, seeking to recover benefits under Mr. Modin's non-union insurance benefit as well. In her complaint, Petitioner characterized Mr. Modin's non-union insurance benefit as a "vested right" and as "compensation" which could not be altered or reduced without violating 49 U.S.C. § 5(2)(f) and the 1966 ICC order. By amendment, Petitioner also claimed that the failure of the Respondents to notify Mr. Modin of his conversion rights under the non-union policy violated state law and entitled her to recover the policy death benefits in full from the Respondents. Respondents denied Petitioner's allegations and alleged that her claims were barred by the statute of limitations. All parties moved for summary judgment and filed supporting affidavits.

The district court held that 49 U.S.C. § 5(2)(f) and the ICC order prescribed the minimum merger protections for both union and non-union employees and that, since Mr. Modin's post-merger fringe benefits were maintained at the union level, Respondents had not violated 49 U.S.C. § 5(2)(f) or the 1966 ICC order. The district court concluded, further, that the Respondents had no duty under state law to notify Mr. Modin specifically of the cancellation of his non-contributory non-union policy. Judgment was entered for the Respondents.

On appeal, the majority panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's holding that Mrs. Modin had no cause of action under 49 U.S.C. § 5(2)(f) or the 1966 ICC order

against Respondents for providing union group life insurance benefits only. The majority panel of the Sixth Circuit held further that, although the ICC order imposed a duty upon the Respondents to notify Mr. Modin specifically of the termination of his non-union group life insurance benefits, Petitioner's claim, filed more than two years after Mr. Modin discovered that he might no longer be entitled to such insurance, was time-barred by 49 U.S.C. §16(3)(b) [now 49 U.S.C. §11706(c)(1)]. With respect to Petitioner's state law claim against the Respondents for failing to notify Mr. Modin of the termination of his non-union insurance policy, the majority panel of the Sixth Circuit held that such claim was preempted by federal law and could not be asserted. In a concurring opinion, Circuit Judge Kennedy urged affirmance of the district court's decision on the same grounds relied upon by the district court.

REASONS FOR DENYING THE WRIT

1. *No Special Or Important Reasons Exist For Granting The Writ.*

The facts of this case are relatively unique and not likely of repetition. Similarly, the issue of federal law presented for review is extremely narrow and not of general interest. There are, therefore, no special or important reasons for granting the writ and the Petition should be denied.

2. *The Decisions Of The District Court And Court Of Appeals In This Case Are In Accord With Applicable Decisions Of This Court, And Are Consistent With Decisions Of Other Federal Courts Of Appeal On The Same Matter.*

Petitioner states in her Petition: "The heart of this case is in the petitioner's theory that the action of the railroad in cancelling her husband's fringe benefit life insurance, violates 5(2)(F) [sic] and that issue alone determines the

case." Petition, p. 5. Petitioner has abandoned any claim that the Respondents are liable under state or federal law for failing to notify her husband of the cancellation of his non-union group life insurance policy and has not asserted any error with respect to the resolution of such claims by the courts below. Before this Court, Petitioner focuses solely upon 49 U.S.C. § 5(2)(f) and asserts that the courts below both erred by holding that the Respondents' post-merger treatment of Mr. Modin's life insurance benefits did not violate 49 U.S.C. § 5(2)(f).

Petitioner's chief contention is that the decisions of the district court and court of appeals in this case are contrary to the decision of this Court in *Norfolk and Western Railway* v. *Nemitz*, 404 U.S. 37 (1971), which defines the scope of protections afforded under 49 U.S.C. § 5(2)(f). In *Nemitz*, the ICC approved a consolidation of the Sandusky Line of Pennsylvania with the Norfolk & Western Railway Company and, in the discharge of its duty under 49 U.S.C. § 5(2)(f) to provide a fair and equitable arrangement to protect the interests of employees affected by the consolidation, adopted and approved the terms of an existing collective bargaining agreement. One year after the consolidation, the Norfolk & Western Railway Company and a union entered into a new collective bargaining agreement which reduced by approximately two-thirds the wage guarantees of trainmen who had worked for the old Sandusky Line. This Court held that, while the post-consolidation labor agreement could "vary" union employee protections afforded by the ICC consolidation order, it could not "substantially abbrogate" union employee protections based upon such an order. 404 U.S. 44.

Petitioner asserted below that *Nemitz* requires the Respondents to ignore the reclassification of employees

from non-union to union positions and to maintain post-merger fringe benefits for non-union employees at the same level as pre-merger fringe benefits. However, as both the district court and the court of appeals in this case recognized, *Nemitz* does not prohibit a reduction in the fringe benefits of non-union employees following a railroad merger. *Nemitz* holds specifically that, where the ICC fulfills its statutory obligation under 49 U.S.C. § 5(2)(f) to protect the interests of employees affected by a railroad merger by adopting as a condition of merger the protections of a preexisting collective bargaining agreement, the provisions of that agreement supply the minimum measure of protection and fairness required under 49 U.S.C. § 5(2)(f). 404 U.S. 43. Both the district court and the court of appeals reasoned that, since Petitioner's decedent never received fewer merger protections and benefits than those guaranteed to union employees while in the employ of Respondents, Petitioner had no cause of action against Respondents for violation of 49 U.S.C. § 5(2)(f) or the 1966 ICC order. The majority panel of the court of appeals stated:

> "Modin was not entitled under § 5(2)(f) of the Act or the I.C.C. order approving the merger or any contractual arrangement to receive all of the benefits of his old status as a non-union member as well as the added benefits of his new status as a union member. No principle of federal law, nor any contract made pursuant to a federal statute or regulation governing the merger, required the railroad to continue Modin's non-union group life insurance policy." 650 F.2d 833.

The district court below also expressly rejected Petitioner's contention that 49 U.S.C. § 5(2)(f), as interpreted in *Nemitz*, "vested" non-union employees such as Mr. Modin with an absolute and indefeasible right to non-union group life insurance benefits. Appendix to Petition, p. A-18. Its decision is consistent with that of

the United States Court of Appeals for the Third Circuit in *Antonioli* v. *Lehigh Coal and Navagation Co.*, 451 F.2d 1171 (3rd Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), in which the Third Circuit held that neither 49 U.S.C. § 5(2)(f), nor any ICC order issued pursuant to that statute, is intended to vest individuals with indefeasible rights to specific fringe benefits. In *Antonioli*, union employees who were furloughed in anticipation of a railroad consolidation sought compulsory arbitration of their claims for displacement and severance benefits under the ICC protective merger order issued in that case. The court found that the employees' claims, filed seven years after the date of the consolidation, were barred by the statute of limitations and stated.

> "[The employees] argue that the rights of the affected workers are vested rights of a continuous nature and thus not barred by the statute of limitations. *The analysis of the four-year protective period as creating a vested right to compensation which continues until such a period terminates is rejected.* It is clear from the face of the statute [§ 5(2)(f)] that the congressional mandate is to provide a four-year job protection period and not to create a vested right to compensation. The protective order issued by the ICC as a condition of the merger imposed a duty on the Railroad to insure that employees would not be adversely affected by the merger and provided a scale of compensation for violations of that duty. *There is no vested right to compensation as [the employees] allege, but rather a right to protection from changes in employment status resulting from the merger.*" 451 F.2d 1174 [Emphasis added].

This Court has stated repeatedly that the purpose of 49 U.S.C. § 5(2)(f) is to provide mandatory protections for the interests of employees affected by railroad mergers, not to freeze jobs or positions. *Nemitz*, 404 U.S. 42; *Brotherhood of Maintenance of Way Employees* v. *United*

States, 366 U.S. 170, 176-77 (1961); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 148 (1950). A collective bargaining agreement adopted pursuant to an ICC merger order supplies the minimum measure of fairness required under 49 U.S.C. § 5(2)(f). *Nemitz*, 404 U.S. 43. As the district court and court of appeals in this case properly recognized, 49 U.S.C. § 5(2)(f) is not violated if the pay and benefits afforded all employees after a merger are in accord with the terms of the collective bargaining agreement that is adopted by the ICC as a condition of merger. That is what occurred in this case, and the decisions of the courts below are therefore correct.

CONCLUSION

The federal issue presented for review is exceedingly narrow and not likely of repetition. The decisions of the district court and court of appeals in this case are in accord with the applicable decisions of this Court and with those of other federal courts of appeal on the same matter. Respondents respectfully submit that the Petition For Writ of Certiorari should be denied.

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APPENDIX

APPENDIX A

THE SUBSIDIARIES AND AFFILIATES OF THE PENN CENTRAL CORPORATION (THE SUCCESSOR IN INTEREST TO RESPONDENTS, NEW YORK CENTRAL COMPANY, PENNSYLVANIA-NEW YORK CENTRAL TRANSPORTATION COMPANY AND TRUSTEES OF PENN CENTRAL — ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. McARTHUR) ARE:

Pennsylvania Company
Arvida Corporation
Arvida of Georgia, Inc.
Arvida Insurance, Inc.
Arvida Insurance of Boca Raton, Inc.
Arvida Insurance of Georgia, Inc.
Arvida Insurance of Sarasota, Inc.
Arvida Investment Co.
Arvida Management Co.
Arvida Mortgage Co.
Arvida Realty Sales, Inc.
Arvida Realty Inc. of Georgia
Arvida Resort Communities, Inc.
Broken Sound Golf Club, Inc.
Broward Farms, Inc.
Concord Industries, Inc.
Coral Woods Building & Development Corporation
Coral Woods Homes, Inc.
Coto de Caza Development Corporation
Club de Caza
Sawgrass Properties, Inc.
West Broward Nurseries, Inc.
Western Rock and Sand, Inc.
Penn Central Energy Group, Inc.
Buckeye Natural Gas
Buckeye Pipe Line Company
Buckeye Tank Terminals, Inc.
ConMass Pipeline Company
Jet Lines, Inc.

Buckeye Fuels Company
Buckeye Petrofuels Company
D.J. Witman Co.
Temple Car Wash, Inc.
Oil Products Company, Inc.
Buckeye Gas Products Company
Suburban Tank Lines
Uregas & Doxol Gas Properties, Inc.
LPG International Company
Frederick Bottled Gas Compnay, Inc.
Energy Shack, Inc.
Buckeye Appalachian Energy Company
Ohio Oil Gathering Corporation
Ohio Oil Gathering Corporation II
Ohio Oil Gathering Corporation III
Ohio Oil Gathering Corporation IV
Cubby Drilling, Inc.
Buckeye Tennessee Gas Gathering Company
Butler-Johnson, Incorporated
Clearfield Bituminous Coal Corporation
Edgington Oil Company, Inc.
Hercules Oil Company of San Diego, Inc.
Sahuaro Petroleum & Asphalt Co.
GSC/Six Flags Corporation
Great Southwest Corporation
GSC Development Corporation
The Greenhouse, Inc.
Leadership Mortgage Investment Co.
Recreation Environments, Inc.
Lake California Development Company
World/Houston, Inc.
Great Southwest Overseas Financial Corporation, N.V.
Six Flags, Inc.
Astropark, Inc.
Movieland Wax Museum, Inc.
Six Flags Amusement Centers, Inc.
Six Flags Over Georgia, Inc.
Six Flags Over Mid-America, Inc.

Six Flags Management Corp.
Six Flags Magic Mountain, Inc.
Six Flags Over Texas, Inc.
Pennrec Co.
Great Adventure, Inc.
Stars Hall of Fame, Inc.
Penn Land, Inc.
Penn Land (Ohio), Inc.
The Ann Arbor Railroad Company
G.K. Technologies, Inc.
PCC Holdings, Inc.
Marathon Manufacturing Company (Delaware)
Business Funds, Inc. (Delaware)
Business Funds, Inc. (Texas)
Marathon Manufacturing Company (Alabama)
Handy Window Creations, Inc.
Marathon Battery Company
Marathon International Company
Marathon Leasing Company
LeTourneau Offshore, Inc.
Marathon Marine Ventures, Inc.
Marathon Shipbuilding Company
Management Advisory Services, Inc.
Marathon Morco Company
Marathon Metallic Building Company
Marathon Steel Company
Marathon Warehouse Company
Southmost Supply Company
Kelven, Inc.
Pearl River Development Corporation
R.G. LeTourneau, Inc.
Marathon LeTourneau Company
Marathon LeTourneau Sales & Service Company
Marathon RGL Company
Marathon LeTourneau Offshore Company
Marathon LeTourneau Offshore Pte. Ltd.
Marathon Paving & Utility Constructors, Inc.
Diversified Contractors, Inc.

Marathon LeTourneau Leasing Company
Shadywood Leasehold Company
PCC Leasing Corporation
PCC 245 Leasing Corporation

Discontinued Subsidiaries

American Contract Company
Beech Creek Railroad Company
The Chicago River and Indiana Railroad Company
The Cleveland, Cincinnati, Chicago and St. Louis Railroad Company
The Peoria and Eastern Railway Company
The Cleveland Union Terminals Company
Despatch Shops, Inc.
The Indianapolis Union Railway Company
Lehigh Valley Railroad Company
The Little Miami Railroad Company
The Mahoning Coal Railroad Company
The Michigan Central Railroad Company
The New York and Harlem Railroad Company
The New York Connecting Railroad Company
The Northern Central Railway Company
Union Railroad Company of Baltimore
The Owasco River Railway, Inc.
Pennsylvania-Reading Seashore Lines
Pennsylvania Tunnel and Terminal Railroad Company
Pittsburgh, Fort Wayne and Chicago Railway Company
Terminal Realty Penn Company
The United New Jersey Railroad and Canal Company
The Philadelphia and Trenton Railroad Company
Waynesburg Southern Railroad Company
West Jersey and Seashore Railroad Company

THE SUBSIDIARIES (EXCEPT WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES OF RESPONDENT, CONSOLIDATED RAIL CORPORATION, ARE:

Calumet Western Ry. Co.
Indiana Harbor Belt RR Co.
Akron & Barberton Belt RR Co.

Albany Port RR Corp.
Belt Ry. Co. of Chicago
Chicago & Western Indiana Ry. Co.
Detroit Terminal RR Co.
Fruit Growers Express Co.
Lake Erie & Eastern RR Co.
Monongahela Ry. Co.
Nicholas, Fayette & Greenbrier RR Co.
Peoria & Pekin Union Ry. Co.
Pittsburgh, Chartiers & Youghiogheny Ry. Co.
Terminal RR Association of St. Louis
Toledo Terminal RR Co.
Trailer Train Co.

APPENDIX B

49 U.S.C. §11347. Employee Protective Arrangements In Transactions Involving Rail Carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title [49 USC §§11344, 11345, 11346], the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45 [45 USC § 565]. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Opposition

2

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KATHERINE E. MODIN,

Petitioner,

v.

NEW YORK CENTRAL COMPANY AND/OR ITS SUCCESSORS IN INTEREST, PENN CENTRAL COMPANY AND/OR ITS SUCCESSORS IN INTEREST, TRUSTEES FOR PENN CENTRAL; ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. MCARTHUR, AND/OR THEIR SUCCESSORS IN INTEREST, CONSOLIDATED RAIL CORPORATION, AND MUTUAL OF NEW YORK LIFE INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT, MUTUAL OF NEW YORK LIFE INSURANCE COMPANY, IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The statement of questions presented for review contained in the Petition is adequate.

PARTIES

The names of all parties are contained in the caption. Pursuant to Rule 28.1 of the Revised Rules of The United States Supreme Court, Respondent Mutual of New York Life Insurance Company submits the following list of subsidiary and affiliate companies:

Key Resources, Inc.

MONY Advisors, Inc.

MONYCO, Inc.

MONY Life Insurance Company of Canada

MONY Reinsurance Corporation

MONY Sales, Inc.

The MONY Fund, Inc.

1740 Ventures, Inc.

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McGinnis v. *Bankers Life Co.*, 39 A.D. 393, 334 N.Y.S.2d 270 (1972) 7

Norfolk and Western Railroad Co. v. *Nemitz*, 404 U.S. 37 (1971) 6, 9

STATUTES:

49 U.S.C. § 5(2)(f) 3, 4, 5, 6, 8

49 U.S.C. §16 (3)(b) 5

McKinney's Consolidated Laws of New York, Ch. 27, §161(1)(e) (1966) 7

McKinney's Consolidated Laws of New York, Ch. 27, § 204(3) (1966) 7

MISCELLANEOUS:

Interstate Commerce Commission Report, Finance Docket No. 21989, 377 ICC 543 (April 6, 1966) 3, 4, 5, 6

IN THE

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No. 81-444

KATHERINE E. MODIN, *Petitioner,*

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NEW YORK CENTRAL COMPANY, *et al., Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT, MUTUAL OF NEW YORK LIFE INSURANCE COMPANY, IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, a copy of which is contained in Appendix A to the Petition, was filed June 2, 1981, and is reported at 650 F.2d 829. The Order and Memorandum Opinion of the United States District Court of the Western District of Tennessee, Western Division (Memphis), copies of which are contained at Appendices B and C of the Petition, were filed May 18, 1978, and October 3, 1978.

JURISDICTION

The jurisdictional statement contained in the Petition is adequate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved contained in the Petition is adequate.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Petitioner's statement of the case, Respondent Mutual of New York Life Insurance Company offers the following Counterstatement:

None of the issues for which Petitioner seeks review involve this Respondent, Mutual of New York Life Insurance Company (hereinafter, "MONY"). Instead, Petitioner is aggrieved only by the determination of the Court of Appeals that no principle of federal law, nor any contract made pursuant to a federal statute or regulation governing the railroad merger, required the Respondent railroad to continue her husband's non-union group life insurance coverage.

Petitioner's husband Roy A. Modin had been an employee in the Memphis, Tennessee, office of the New York Central Railroad from 1942 until its merger with the Pennsylvania Railroad Company, and an employee of the successor to the merger, Pennsylvania-New York Central Transportation Company (hereinafter, "Penn Central"), until his death in 1975. Modin was a "fully excepted" employee, i.e., he held a position exempt from coverage by a union collective bargaining agreement, in 1962 when New York Central began providing group life insurance coverage equal to twice one year's salary for its "fully excepted" employees under MONY's module policy number 625.

The module certificate Modin received from the railroad advised him that his insurance would cease upon termination of his continuous service in an eligible class of employees for any reason whatsoever, and further notified him that he was entitled, by compliance with certain conditions, to convert to an individual life policy

within thirty-one (31) days of termination of the group coverage.[1]

During the early 1960s, the New York Central Railroad and the Pennsylvania Railroad Company were in the process of merging pursuant to the requirements of the Interstate Commerce Act, 49 U.S.C. § 5(2). On May 20, 1964, the railroads and twenty-three unions representing about seventy-five percent of the rail employees entered into a protective agreement providing, *inter alia*, that the merged railroad would retain all existing union employees willing to accept employment, and that none would be deprived of employment nor placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment. As one of its conditions of approval of the merger, the ICC required the railroads to apply the May 20, 1964, protective agreement to the non-union employees. *Interstate Commerce Commission Report*, Finance Docket Number 21989, pages 543-45 (April 6, 1966).

When Modin was required to join the Brotherhood of Railway, Airline, and Steamship Clerks in February, 1968, pursuant to a newly negotiated agreement between Penn Central and the Brotherhood, his life insurance under the MONY group policy terminated as he was no longer a member of the eligible class of "fully excepted" employees. However, Modin did acquire coverage under a union life insurance program.

A few months later, on May 31, 1968, MONY ceased writing group life coverage for the "fully excepted" em-

[1] The provisions of the MONY insurance certificate Modin received from the railroad relating to termination and conversion are set forth in Appendix A to this Brief.

ployees; this group life risk was assumed by New York Life Insurance Company. At no time material to this case did the railroad alter the life insurance benefits provided to "fully excepted" employees, although the insurance companies underwriting the coverage changed.

In 1970, when Penn Central promoted Modin to a "fully excepted" managerial position he again became eligible for non-union insurance. However, MONY was no longer writing such a group policy for the railroad. When his managerial position was abolished in 1972, Modin was assigned at his request to a union position. Upon her husband's death in 1975 as a member in good standing of the union, Petitioner accepted union agreement death benefits.

On September 16, 1976, Petitioner filed suit in the United States District Court for the Western District of Tennessee to recover proceeds under the MONY group life insurance policy, contending that pursuant to 49 U.S.C. § 5(2)(f) and the ICC report, Modin's rights to non-union life insurance had become absolutely vested regardless of his change of status from an "excepted" employee to a union employee. Petitioner further contended that Respondents were liable for failure to notify Modin of termination of the non-union insurance coverage. In their Answers, both the railroad and MONY contended that the Complaint failed to state a claim upon which relief could be granted. All parties moved for Summary Judgment.

By Order of May 18, 1978, the District Court found that Modin had been treated in the same fashion as any union employee, and that the change in life insurance benefits was not due to the merger either by reason of the union agreement or the ICC Order approving the merger. The Court found that jobs or classification of

jobs were not frozen, as the ICC Order granted Modin only the same standard of protection as afforded union employees. The Court concluded that Modin was not vested indefeasibly of rights to the group life insurance policy in question either before or after the merger, and further held that under the law of New York, the situs of the insurance contract, even in the absence of notice, the insuror would not be liable to Petitioner.

In its Memorandum Opinion filed October 3, 1978, the District Court further held that neither New York nor Tennessee law imposed a duty upon the employer railroad to notify the employee of termination of the MONY coverage. Judgment was entered for all Respondents.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, on different grounds. The Court of Appeals found that Modin received additional significant benefits as a union member from 1968 to 1975 that he would not have otherwise received, that his rate of pay increased dramatically, that he received job security, and that he was not laid off after the merger or when Penn Central became insolvent. The Court concluded that termination of Modin's non-union insurance coverage was not unfair and that Modin was not entitled under 49 U.S.C. § 5(2)(f) nor under the ICC Order to receive the benefits of a non-union employee as well as the added benefits of his new status as a union member.

The Court of Appeals went on to hold that although Modin should have received notice from the employer railroad that his transfer to union status would effect a forfeiture of the MONY policy, so that he could take advantage of the policy's conversion privilege, any claim based on failure of notice was barred by the applicable two year statute of limitations, 49 U.S.C. §16(3)(b).

The Court of Appeals agreed with the District Court's finding that neither federal law nor state law imposed liability on the insurance company for failure to notify Modin of the cancellation by his employer.

In her Petition for Writ of Certiorari filed in the Supreme Court of the United States on August 31, 1981, Petitioner sought review of the finding that there had been no violation of 49 U.S.C. § 5(2)(f) nor of the ICC Order, 327 ICC 543.

REASONS FOR DENYING THE WRIT

There are no special or important reasons, as required by Rule 17 of the Rules of The Supreme Court of The United States, for granting the Writ, particularly as to Respondent MONY. The collateral issue of notice of policy termination has not been presented for review; Petitioner concedes:

> . . . that many collateral issues have been discussed and decided. The Petitioner seeks certiorari upon the basis that these decisions deviated from *Norfolk and Western Railway Company* v. *Nemitz*, 404 U.S. 37 (1971) and greatly reduced the protection contemplated in 49 U.S.C. § 5(2)(f).[1]

Nowhere in the Petition is there any contention that the District Court or the Court of Appeals incorrectly applied the law applicable to Respondent MONY. In fact, except for including MONY in the caption, the Petition makes no further reference whatsoever to this Respondent. Petitioner's election to seek a Writ of Certiorari as to this Respondent is frivolous and unfounded.

In the Courts below, Petitioner had contended that because MONY failed to inform her husband of termination of the coverage so that he could exercise his conver-

[1] Petition, p. 3.

sion rights, MONY would still be liable to her for life insurance benefits due upon her husband's death in 1975. The module policy was issued and delivered in the State of New York, and conformed to New York's statutory requirements for employee group insurance policies by providing a thirty-one (31) day option for coversion to an individual policy upon termination of the employee's coverage under the terms of the group policy. *McKinney's Consolidated Laws of New York*, Ch. 27, §161(1)(e) (1966). The New York statute provides that where the insuror fails to give notice of the conversion privilege, the policy is amended by operation of law to extend the conversion privilege for ninety (90) days after the group coverage termination date. *McKinney's Consolidated Laws of New York*, Ch. 27, § 204(3) (1966); *Deville* v. *Continental Assurance Co.*, 10 A.D.2d 386, 199 N.Y.S.2d 876, *aff'd* 8 N.Y.2d 1080, 170 N.E.2d 457 (1960).

Where, as here, the employee dies more than ninety (90) days after the termination date, New York law holds that even in the absence of notice, all rights under the policy have expired and the insuror is not liable to the beneficiary for the death benefit. *McGinnis* v. *Bankers Life Co.*, 39 A.D.2d 393, 334 N.Y.S.2d 270 (1972).

At all times material to this action, the law of Tennessee has been that there is no duty to notify the employee of cancellation of the group coverage and the attendant conversion privilege. *American National Insurance Co.* v. *Jackson*, 12 Tenn. App. 305, 309 (1930), *cert. denied* (1931).

Petitioner has failed to advance any basis under state law, federal law, and the record in this cause for granting the Petition and issuing the Writ of Certiorari as to Respondent, Mutual of New York Life Insurance Company.

Petitioner herself concedes that "the heart of this case is in the Petitioner's theory that the action of the railroad in cancelling her husband's fringe benefit life insurance, violates 5(2)(f) and that issue alone determines the case."[1] Therefore, MONY respectfully submits that the Petition should be dismissed as to this Respondent, with damages as provided in Rule 49.2 of the Rules of the Supreme Court of the United States.

[1] Petition, p. 5.

CONCLUSION

The Writ should be denied because there are no special and important reasons for it to be granted. The decisions of the District Court and the Court of Appeals are in conformity with *Norfolk and Western Railroad* v. *Nemitz*, 404 U.S. 37 (1971).

Moreover, this Respondent respectfully submits that the Writ should be denied and the Petition should be dismissed as to this Respondent as frivolous because Petitioner does not seek review of the decisions of the Courts below as to any of the collateral issues of state insurance law consistently resolved in favor of Respondent Mutual of New York Life Insurance Company.

Respectfully submitted,

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APPENDIX

APPENDIX A

The module certificate Modin received under cover letter of March 6, 1963, from New York Central informed Modin of the termination and conversion provisions of the module policy between MONY and the railroad:

TERMINATION OF EMPLOYEE'S DEATH BENEFIT COVERAGE

The employee's One-Sum insurance will terminate, except as provided in the Continuance of Death Benefit Coverage and Conversion Privilege provisions, on the first of the following to occur:

(a) Termination of his continuous service in an Eligible Class of Employees for any reason whatsoever.

(b) Termination of the Module Policy, or amendment of the Policy to cancel insurance on the class of employees to which the employee belongs.

CONVERSION PRIVILEGE

This conversion privilege is available during the 31-day period beginning with termination of an employee's coverage, where such termination is due to:

(a) termination of his continuous service in an Eligible Class of Employees, or

(b) termination of the Policy or amendment of it to cancel insurance on the class of employees to which the employee belongs, provided in either case he had been insured for at least 5 years.

If the employee applies for it to Mutual of New York during such 31-day period, Mutual of New York will issue to him an individual policy of life insurance. No evidence of insurability shall be required for the new life insurance coverage.

The policy shall be on his life and may be in any one of the forms of life insurance then customarily issued by Mutual Of New York, except term insurance. However, the employee may elect to have the insurance preceded by single premium

term insurance for a period not exceeding one year. The amount to be converted must meet Mutual Of New York's minimum requirements for the plan selected by the employee.

The face amount of the new policy shall, at the option of the employee, be equal to or less than (a) the One-Sum Death Benefit in force on his life immediately before termination of his coverage less (b) the face amount of any policy in force on the employee's life which was issued under this Conversion Privilege on a prior termination of insurance.

However, where the Conversion Privilege is available because of termintion or amendment of the Policy, the amount of insurance on the employee's life under the new policy cannot exceed the amount of his insurance ceasing under the Policy, less the amount of any life insurance coverage for which he is or becomes eligible as an employee of the Employer within 31 days after the termination or amendment of the Policy, nor can it exceed $2,000.

No additional insurance benefits will be included in the new policy, except with the approval of Mutual Of New York at the time the employee applies for the new policy and subject to the furnishing of such requirements as it shall then consider necessary.

The premium for the new policy shall be that applicable to the class of risk to which the employee belongs and to the form and amount of the policy at his then attained age.

The new policy will take effect at the end of such 31 days if the employee is then living and the first premium for it has previously been paid to Mutual Of New York at its Home Office.

CONTINUANCE OF DEATH BENEFIT COVERAGE

CONTINUED DEATH BENEFIT

The Death Benefits under the Policy shall continue in force for the 90-day period following the due date of the premium first in default. An employee's insurance shall also continue in

force for the 31-day period during which he may be eligible to exercise the Conversion Privilege defined above, whether or not he avails himself of that privilege.